IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3522 OF 2004

Baba @ Kamlakar Kisan Bodke & Ors. ...Applicants

Versus

The State of Maharashtra ...Respondent

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Mr.A.M.Mundargi with Mr.Indrajeet Joshi
for Applicant.
Mr.D.S.Mhaisapurkar, A.P.P. with Mr.S.R.Shinde,
A.P.P. for Respondent.

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CORAM: A.M.KHANWILKAR, J.

NOVEMBER 24, 2004.

P.C.

1. Heard Counsel for the parties. The Applicants are arraigned as accused Nos.1, 2 and 3 in C.R.No.3206 of 2003 registered with Deccan Police Station, District Pune, inter alia for offences punishable under Section 3(1)(1) and 3(2) of Maharashtra Control of Organised Crimes Act, 1999 (hereinafter referred to as 'MOCA'). The

First Information Report (F.I.R.) was lodged on 18th December 2003 and the Applicants came to be arrested on 30th December 2003 and were produced before the concerned Magistrate on the same day i.e. 30th December 2003. In the circumstances, 90 days period for filing of charge-sheet came to end on 28th March 2004, which was incidentally a Sunday, and therefore, Court holiday. In this backdrop, the prosecution filed application on 29th March 2004 for extension of time for filing the charge-sheet. It appears that ex-parte ad-interim order was passed on the said application on 29th March 2004 and show-cause notice was issued to the Applicants/accused. Pursuant to the said show-cause notice, Applicants appeared before the Court on 2nd April 2004 when the application for extension of time was scheduled to be heard. After giving opportunity to the Applicants/accused, and considering the record and the grounds pressed into service on behalf of the prosecution, the Court below by order dated 2nd April 2004, extended time to file charge-sheet till 17th April 2004. The charge-sheet came to be filed on 17th April 2004. However, on the previous day i.e. on 16th April

2004, the Applicants preferred application for being released on bail on the ground of default under Section 167 of the Criminal Procedure Code, 1973 (hereinafter referred to as 'the Code'). That Application is rejected on 30th June 2004 for the reasons recorded therein.

2. By this application under Section 439 read with Section 167 of the Code, the Applicants are questioning the correctness of decision of the Trial Court dated 29th March 2004 extending the time to file charge-sheet ex-parte as well as order dated 2nd April 2004, which was passed after hearing the Applicants, granting time to file charge-sheet till 17th April 2004. In substance, the argument canvassed on behalf of the Applicants is that the Application as presented by the prosecution for extension of time, was after the expiry of statutory period of 90 days. This argument proceeds on the basis that 90 days period expired on 28th March 2004 and for which reason, Application as filed on 29th March 2004 was after the expiry of the statutory period of 90 days, which could not have been entertained in law. To

buttress this submission, reliance is placed on the decision of our High Court reported in **1983 (1) Bom.C.R. 578 in the case of The State of Maharashtra vs. Sharad B.Sarda**.

3. It is next contended that the Court below has, in any case, exceeded jurisdiction in granting ex-parte extension of time to file charge-sheet on 29th March 2004. Reliance is placed on the decision reported in **AIR 1994 SC 2623 in the case of Hitendra Vishnu Thakur v. State of Maharashtra** as well as **(1996) 1 SCC 44 in the case of Devinderpal Singh vs. Govt. of National Capital Territory of Delhi**. Reliance is also placed on the unreported decision of our High Court in the case of **Vinayak Valchand Shinde & Anr. vs. State of Maharashtra & Anr. etc.** decided on 14th/18th February 2003.

4. Essentially two questions have been raised before this Court. The first question is that the application filed on 29th March 2004 is beyond the statutory period and therefore, order passed on such application is without authority of law.

Secondly, the order passed on 29th March 2004 being without notice to the Applicants, is non-est in the eyes of law and the extension granted on 2nd April 2004 till 17th April 2004, though after hearing the Applicants, is of no avail, because in law, the Application as presented on behalf of the prosecution was unavailable.

5. Having considered the rival submissions, I have no hesitation in taking the view that the arguments canvassed before this Court on behalf of the Applicants are ill-advised. The arguments clearly overlook the exposition in the case of **Hitendra Vishnu Thakur (Supra)** in paragraph 30 of the said decision, which has been considered by the Constitution Bench of the Apex Court in **Sanjay Dutt vs. State through C.B.I., Bombay (II) reported in 1994 SCC (Cri.) 1433**, clearly answers the issue as to whether Application as filed by the prosecution beyond 90 days could be entertained by the Court. In the first place, there is no statutory provision which precludes the prosecution from instituting application for extension of time after expiry of 90 days. The settled legal position is that it is

open to the prosecution to take out such application before the accused exercises his right to avail remedy of bail on the ground of default under Section 167 of the Code. In the present case, it is not in dispute that the Applicants preferred application for bail on the ground of default on 16th April 2004, much after the prosecution had taken out application for extension of time to file charge-sheet and formal orders came to be passed on the said application, initially ex-parte, and subsequently, after hearing the Applicants herein. Once extension to file charge-sheet is granted by the Court, in such a case, the question of entertaining application for being released on bail on the ground of default under Section 167 of the Code, does not arise. That is so, because, by order granting extension of time to file the charge-sheet, the statutory period to file charge-sheet gets extended to the limited extent and if charge-sheet is filed within such period, there is no right inherent in the accused to seek for bail on the ground of default under Section 167 of the Code. It is only if the charge-sheet is not filed within the statutory

period or the extended period as may be permissible by law, the right to be released on bail in favour of the accused gets crystalised and which is an indefeasible right. However, in the fact situation of the present case, the Applicants have chosen to file application only after extension was granted by the Court of competent jurisdiction. The relevant extract from the decision of **Hitendra Vishnu Thakur (Supra)**, which is reproduced in the case of **Sanjay Dutt (Supra)** in Paragraph 44 plainly provides for a situation that where the accused prefers application for being released on bail, the Court is under an obligation to give an opportunity to the Public Prosecutor of being heard before passing any order on such application and upon notice of such application, the Public Prosecutor can apply for extension of time and if such request is made, both the issues are required to be considered by the Court whether while granting or refusing bail. If it is so, then obviously in the fact situation of the present case, the Applicants cannot be heard to say that the prosecution was incompetent in taking out application for extension of time on 29th March 2004, albeit, after the

expiry of statutory period of 90 days. Viewed in this perspective, the decisions pressed into service on behalf of the Applicants are of no avail to the Applicants.

6. To overcome the above position, perhaps, a feeble attempt has been made on behalf of the Applicants to question the correctness of the order passed by the Court below dated 29th March 2004 as well as 2nd April 2004. However, I find no merits even in that challenge. Assuming that the Applicants are justified in making grievance that it was not open to the Trial Court to extend the time, ex-parte, as was done on 29th March 2004, however, it is seen that the Applicants were given show-cause notice, and time to file charge-sheet, eventually came to be extended after hearing both the sides on 2nd April 2004. The reasons recorded by the Court below in the order dated 2nd April 2004 for extending the time to file charge-sheet are germane and cannot be said to be inappropriate in any manner. No interference is warranted with the approach of the lower Court for extending the time to file charge-sheet for the reasons recorded

in the order dated 2nd April 2004. In the circumstances, challenge to order dated 2nd April 2004 is devoid of merits.

7. A priori, there is no substance in this Application. The same, therefore, deserves to be dismissed. Hence, dismissed.

A.M.KHANWILKAR, J.